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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/826,045	04/04/2001	Sean M. Reilly	P24184-A USA	2364

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Joshua R. Slavitt, Esquire
Synnestvedt & Lechner LLP
Aramark Tower
1101 Market Street
Philadelphia, PA 19107-2950

EXAMINER

GITOMER, RALPH J

ART UNIT PAPER NUMBER

1651

DATE MAILED: 11/14/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/826,045

Applicant(s)

Reilly et al.

Examiner

Ralph Gitomer

Art Unit

1651



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on Oct 20, 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 3-18 is/are pending in the application.
- 4a) Of the above, claim(s) 12-18 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1 and 3-11 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claims _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
*See the attached detailed Office action for a list of the certified copies not received.
- 14) ☒ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s) _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ 6) ☐ Other: _____

The amendment received 10/20/2003 has been entered and claims 1, 3-18 are currently pending in this application, claims 1, 3-11 are considered here.

5 The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

10 (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

15 Claims 1, 4-11 are rejected under 35 U.S.C. 102(b) as being anticipated by each of Nelson and Hansen.

20 Nelson (5,681,712) entitled ❖Surface Colony Counting Device and Method of Use❖ teaches in column 1 lines 40-58, adding water to a thin film culture place with a layer of adhesive coated on the upper surface of the substrate and a growth medium that is cold water soluble. The device is incubated for a period of time and the colonies counted. In column 2 there is a cover sheet. The device allows growth, detection and enumeration of microorganisms. In column 3 there are air permeable materials and an impermeable cover sheet described. In column 8 next to last paragraph, there is a transparent cover sheet to facilitate counting of the colonies. In column 8 last paragraph, the cover sheet permeability is discussed. See the claims.

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Hansen (4,565,783) entitled ~~❖~~Dry Culture Media~~❖~~ teaches in column 2, a device with a water proof substrate, a layer of adhesive coated on the upper surface of the substrate being non-inhibitory to the growth of microorganisms, and a coating of cold water soluble powder adhered to the adhesive containing a medium. There is a transparent cover sheet. The gel has a Brookfield viscosity of at least 1500 cps. In column 3 lines 52-54, the substrate may be transparent to view bacterial colonies. In column 6 line 30, the cover can be permeable to oxygen. See the claims.

All the presently claimed features are taught by each of the above references for the same function as claimed.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered
5 therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103[®] and
10 potential 35 U.S.C. 102(f) or (g) prior art under 35 U.S.C. 103(a).

Claim 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over each of Nelson and Hansen.

15 See the teachings of Nelson and Hansen above.

The claim differs from each of Nelson and Hansen in that it specifies spreading the liquid with a hand press.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to apply the liquid as
20 described by Nelson and Hansen with a hand press because any known method of applying or spreading liquid would have a high expectation of success. No novelty is seen in employing a hand press in applying the liquid.

On page 8 of the present specification, a hand press is described that defines a predetermined area such that the application of the press spreads out the liquid to the predetermined area. On page 14 bridging to page 15, Fig. 11 shows a porous pad is wetted to be placed on the surface. The references of record teach adding an amount of liquid and the methods of doing so are well known in this art. Adding liquid to a predetermined area with a sponge or blotter or other related item is old. No unexpected results or advantage is seen in adding the liquid to any area where the references show the liquid wets the powder in the device. It would appear only the total amount of liquid may be useful to standardize.

Applicant's arguments filed 10/20/2003 have been fully considered but they are not persuasive.

Applicants argue that the exposure step is accomplished by placing the dry collection device on a surface for a predetermined interval of time so that microorganisms in the air can settle out onto the collection device. The cited references do not teach collecting airborne microorganisms by exposing to ambient air.

It is the examiner's position that the present claims, as written, do not require collecting microorganisms from ambient air but simply exposing the device to ambient air. The cited references teach the same device as presently claimed and it

would likely also be exposed to ambient air.

It is respectfully submitted that in order for evidence of unexpected results to be sufficient to rebut a prima facie case of obviousness, the evidence must be commensurate in scope with the claims.

The following prior art pertinent to applicant's disclosure is made of record and not relied upon:

Sullivan (6,054,324) teaches collecting airborne microorganisms.

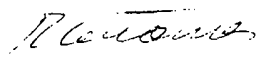
THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ralph Gitomer whose telephone number is (703) 308-0732. The examiner can normally be reached on Tuesday-Friday from 8:00 am - 5:00 pm. The examiner can also be reached on alternate Mondays. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Wityshyn can be reached on (703) 308-4743. The fax phone number for this Art Unit is (703) 872-9306. Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-1235. For 24 hour access to patent application information 7 days per week, or for filing applications electronically, please visit our website at www.uspto.gov and click on the button Patent Electronic Business Center for more information.


Ralph Gitomer
Primary Examiner
Group 1651